Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DISCOVERY HOUSE, INC.,
Petitioner,

v.

CONSOLIDATED CITY OF INDIANAPOLIS AND METROPOLITAN BOARD OF ZONING APPEALS OF MARION COUNTY, INDIANA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 permit the award of compensatory damages for lost profits.

2. Whether a jury's finding that a municipality acted out of irrational prejudice against disabled individuals, in violation of the Equal Protection Clause of the Fourteenth Amendment, may be set aside by a court of appeals on the basis of that court's reweighing of the evidence, without a determination that the jury's finding was unreasonable.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties are identified in the caption. Petitioner Discovery House, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Discovery House, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 319 F. 3d 277. The opinion of the district court denying a motion to dismiss (Pet. App. 41a-59a) is reported at 43 F. Supp. 2d 997. The opinions of the district court denying summary judgment (Pet. App 21a-40a) and denying a motion for judgment as a matter of law (Pet. App. 13a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2003. Pet. App. 1a. A timely petition for rehearing was denied on March 28, 2003. Pet. App. 60a. On June 18, 2003, Justice Stevens extended the time in which to file a petition for a writ of certiorari to July 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132; Section 203 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12133; pertinent provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; pertinent provisions of Section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. 794a(a)(1); and pertinent provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, are set forth at Pet. App. 61a-62a.

STATEMENT

Section 202 of the Americans with Disabilities Act of 1990 ("ADA") prohibits discrimination against the disabled by any public entity. See 42 U.S.C. 12132. Section 504 of the Rehabilitation Act of 1973 similarly prohibits discrimination against the disabled under any program or activity receiving federal financial assistance. See 29 U.S.C. 794(a). In this case, a jury found that respondents violated petitioner's rights under Section 202 of the ADA and Section 504 of the Rehabilitation Act. The jury awarded petitioner approximately $1 million in compensatory damages, primarily for lost profits.

Every other court of appeals that has considered the issue has held that compensatory damages are available under Section 202 and Section 504. See pages 9-10, *infra*. Those rulings follow logically, indeed inexorably, from this Court's decisions. Section 202 and Section 504 incorporate by reference the remedies available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which forbids racial discrimination by federally funded programs or activities. See 42 U.S.C. 12133; 29 U.S.C. 794a(a)(2). This Court has repeatedly ruled that Title VI—and therefore, by clear implication, Section 202 and Section 504—allows victims of intentional discrimination to sue for compensatory damages. See *Barnes v. Gorman*, 536 U.S. 181, 184-89 (2002); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70 (1992); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 & n.9 (1984); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

The court below nonetheless overturned the award of compensatory damages to petitioner. Pet. App. 4a-7a. The court of appeals made no mention of the other court of appeals decisions establishing that compensatory relief is available under Section 202 and Section 504; nor did the court of appeals mention this Court's repeated rulings that compensatory damages are available under Title VI and the statutes that incorporate Title VI remedies. Instead the court below simply asserted that in Title VI actions "equitable relief is the order of the day" (Pet. App. 6a) and that the ADA and the Rehabilitation Act do not "contemplat[e] a recovery for lost profits" (Pet. App. 5a).

This conclusion by the court of appeals—on an issue of substantial importance, as we shall demonstrate—is utterly without foundation. It is flatly inconsistent with the language and the logic of this Court's opinions and cannot be reconciled with the decisions of other courts of appeals. Further review is therefore warranted.

The court of appeals also overturned the jury's determination that respondents violated petitioner's rights under the Equal Protection Clause by engaging in intentional discrimination on the basis of disability. Pet. App. 7a-12a. The court acknowledged that, based on the evidence before the jury, unlawful discrimination on the basis of disability was "a possible conclusion" (Pet. App. 11a). But the court nonetheless ordered that judgment be entered for respondents on the Equal Protection issue because "the evidence falls short of proving the point." Pet. App. 11a. The court of appeals' reassessment of the evidence ignores this Court's rulings that the existence *vel non* of discriminatory intent under the Equal Protection Clause is a question of fact, to be determined by the finder of fact. For this reason, too, review by this Court is warranted.

1. Petitioner Discovery House provides drug rehabilitation therapy to more than 2,500 individuals at eleven drug rehabilitation facilities located throughout the United States. R. 1:55-56.[1] Discovery House employs physicians, nurses, and counselors with advanced degrees at each of its facilities, and it engages in counseling, testing, and drug therapy, including the use of the synthetic opioid methadone. R. 1:55-61.

In 1995, Discovery House sought an opinion from the Department of Metropolitan Development, an executive department of respondent Consolidated City of Indianapolis, about whether the Indianapolis zoning ordinance would permit it to open a drug rehabilitation clinic in Indianapolis. Pet. App. 22a. The site in question was within an "HD-2" (Hospital District 2) district that was zoned for, among other things, "offices for physicians, dentists, and other professions dealing with public health." P. Ex. 9 at 13. The Department's Principal Planner advised Discovery House that its clinic

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[1] "R." refers to the transcript of proceedings in the district court. "P.Ex." refers to the Plaintiff's Exhibits filed in the district court.

would be "clearly permitted under the [use] approv[ed] for this site." P. Ex. 1; see Pet. App. 22a. Approximately one month later, Discovery House executed a lease for the premises and began to incur expenses to modify them. Pet. App. 22a. A supervisor in the Department subsequently reiterated that "a methadone clinic is a medical use permitted by right in this building" (P. Ex. 3; Pet. App. 23).

Local residents appealed the Department's determination to respondent Marion County Board of Zoning Appeals (BZA). Pet. App. 23a. The BZA held a hearing at which fourteen witnesses testified in opposition to the proposed clinic. See P. Ex. 10. The BZA also received a petition with 1500 signatures opposing the clinic. P. Ex. 10 at 33. At the conclusion of the hearing, the BZA voted unanimously to overturn the Department's decision and deny a permit to Discovery House. Pet. App. 23a.

The Marion County Superior Court upheld respondent BZA's decision (see Pet. App. 23a), but in 1998, the Indiana Court of Appeals reversed. *Discovery House, Inc. v. Metropolitan Bd. of Zoning Appeals*, 701 N.E. 2d 577 (Ind. Ct. App. 1998). That court stated that "Discovery House's proposed methadone treatment facility constitutes a permitted use under the plain and unambiguous language of the HD-2 zoning ordinance," and that the Discovery House clinic "fits squarely under the ordinance's language" (*id.* at 579).

2. While the case was under submission in the Indiana Court of Appeals, Discovery House brought this action in the Lake County, Indiana, Superior Court. Discovery House alleged, among other things, that respondents had intentionally and unlawfully discriminated on the basis of disability, in violation of Section 202 of the ADA, 42 U.S.C. 12132, Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. See 42 U.S.C. 1983. Respondents

removed the case to the United States District Court for the Northern District of Indiana. The jurisdiction of that court was based on 28 U.S.C. 1441(a) and 28 U.S.C. 1331.

The district court denied respondents' motion to dismiss (Pet. App. 41a-59a) and motion for summary judgment (*id.* at 21a-40a). The case was tried to a jury, which found in favor of Discovery House and awarded $1,022,362 in damages. Pet. App. 13a. The damages were principally compensation for profits that Discovery House lost between the time its zoning permit was denied and the decision of the Indiana Court of Appeals. See Pet. App 18a-19a. The district court denied respondents' post-trial motions for a new trial and for judgment as a matter of law (Pet. App. 13a-20a), specifically holding that the damages award was supported by the evidence. Pet. App. 19a.

3. The court of appeals reversed the judgment of the district court and ordered that judgment be entered in favor of respondents. Pet. App. 1a-12a. The court of appeals first considered whether Discovery House, which is not itself a disabled individual but provides services to individuals with disabilities, could assert a claim under the ADA and the Rehabilitation Act. Pet. App. 4a. The court acknowledged that several other courts of appeals had concluded, in cases presenting similar facts to this one, that a firm like Discovery House—that is, a firm that alleged that it was discriminated against because it served disabled people—could assert rights under Section 202 of the ADA and Section 504 of the Rehabilitation Act. Pet. App. 4a, citing *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F. 3d 35 (2d Cir. 2002); *MX Group, Inc. v. City of Covington*, 293 F. 3d 326 (6th Cir. 2002); and *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37 (2d Cir. 1997). But the court below stated that "we have no need to agree or disagree" with those decisions because "[f]or the most part" those cases "concern[ed] equitable relief" (Pet. App. 4a).

Instead, the court below said, the question was whether "either the ADA or the [Rehabilitation Act] grant[s] Discovery House standing to recover lost profits" (Pet. App. 4a).[2] The court noted that both the ADA and the Rehabilitation Act incorporate by reference the remedies provided for violations of Title VI. Pet. App. 5a-6a. But the court of appeals asserted that the remedial provision of Title VI was "not at all helpful" (Pet. App. 6a). Instead, the court said, when "we look to cases discussing remedies [we] find * * * that equitable relief is the order of the day." Pet. App. 6a. Consequently, the court asserted, "the remedy Discovery House seeks is not available under the two statutes on which it relies—the ADA and the [Rehabilitation Act]" (Pet. App. 6a). The court concluded that Discovery House "does not have standing to seek lost profits, and the claims that seek them should have been dismissed from the case." Pet. App. 6a-7a.

The court of appeals then turned to Discovery House's claim, brought under 42 U.S.C. 1983, that respondents had violated the Equal Protection Clause. The court assumed that Discovery House could seek compensatory damages for the Equal Protection violation (Pet. App. 7a-8a) and recognized that Discovery House would be entitled to prevail if it

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[2] The court of appeals phrased its holding in terms of Discovery House's "standing" to seek compensatory damages for lost profits, perhaps to justify its decision to raise, sua sponte, an argument that was never advanced by respondents below. See note 3, *infra*. The phraseology is potentially misleading, however, because there is no question that Discovery House satisfied the Article III requirements for standing to sue. Discovery House suffered a concrete injury in fact; its injury was caused by respondents' actions; and the remedy would have redressed its injury. See, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The issue, whether or not phrased as a matter of "standing," is whether Section 202 of the ADA and Section 504 of the Rehabilitation Act provide for compensatory damages to a party in Discovery House's position.

showed that respondents had unconstitutionally "discriminated against [it] because its clients are drug addicts." Pet. App. 9a. But the court asserted that Discovery House's claim failed because "there is a lack of evidence of discriminatory intent." Pet. App. 8a. After a brief review of the evidence, the court stated that Discovery House's contention—that respondents "were, in fact, discriminating against its proposed clientele" of disabled individuals—"may be a possible conclusion, in a speculative sense" (Pet. App. 11a). But the court declared that "the evidence falls short of proving the point." Pet. App. 11a. The court suggested that the ADA and Rehabilitation Act issues—which, the court assumed, required a lower level of proof of discriminatory intent than the constitutional question—had affected the jury's determination of the constitutional claim. Pet. App. 11a-12a. Rather than remanding for a new trial, however, the court ordered that judgment be entered for respondents. Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

The court below has resolved an important question concerning the remedies available under the ADA and the Rehabilitation Act in a way that cannot be reconciled with the decisions of this Court or of other courts of appeals. The court of appeals' conclusion that compensatory damages for lost profits are unavailable to a party in Discovery House's position will have far-reaching effects: it will give defendants every incentive to delay complying with Section 202 and Section 504, knowing that the costs of their delay will fall on disabled individuals, or on firms seeking to serve disabled individuals, and will never have to be repaid. Whatever substantive limits Section 202 and Section 504 impose on government actors and private parties, and whatever rights those provisions give to firms like Discovery House—matters that are not in issue here—there is simply no justification for a remedial scheme, like that imposed by the court below, that

encourages resistance to those statutes and effectively rewards defendants for delay in compliance.

The court of appeals also determined to reweigh the evidence that led the jury to conclude that respondents discriminated in violation of the Equal Protection Clause. In doing so, the court below wholly misunderstood the nature of the inquiry into discriminatory intent, which this Court has held to be a question of fact, to be determined by the finder of fact, subject only to limited review on appeal. This Court's review of the court of appeals' erroneous rulings is plainly warranted.

I. The Court Of Appeals' Decision That Section 202 And Section 504 Do Not Permit The Award Of Compensatory Damages For Lost Profits Is Inconsistent With The Decisions Of This Court And Other Courts Of Appeals.

1. Discovery House established that respondents violated its rights under Section 202 of the ADA and Section 504 of the Rehabilitation Act. The court of appeals did not question that conclusion. Instead, the court below ruled that Section 202 and Section 504 did not permit Discovery House to be compensated, by a reward of damages, for the violation of its rights.

Every other court of appeals that has considered the issue has held that compensatory damages are available under Section 202 and Section 504. See, *e.g.*, *Waldrop v. Southern Company Services, Inc.*, 24 F. 3d 152, 157 n.5 (11th Cir. 1994) ("*Franklin [v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)] * * * permit[s] damage awards for discrimination under § 504"); *Pandazides v. Virginia Bd. of Ed.*, 13 F. 3d 823, 829-32 (4th Cir. 1994) (overturning *Eastman v. Virginia Polytechnic Institute*, 939 F. 2d 204 (4th Cir. 1991), which barred compensatory damages for pain and suffering under Section 504, and concluding that Section 504 provides

"the full panoply of damages" (13 F. 3d at 832)); *Davoll v. Webb,* 194 F. 3d 1116, 1140-42 (10th Cir. 1999); *Lovell v. Chandler*, 303 F. 3d 1039, 1056-57 (9th Cir. 2002); *W.B. v. Matula*, 67 F. 3d 484, 494 (3d Cir. 1995) ("[P]laintiffs may seek monetary damages directly under § 504"); *Rodgers v. Magnet Cove Public Schools*, 34 F. 3d 642 (8th Cir. 1994) ("[A]ll legal and equitable remedies are available * * * under Section 504"). In fact, in 1996, the Sixth Circuit remarked that "[e]very circuit that has reached the issue after *Franklin [v. Gwinnett County Public Schools, supra*] has held that compensatory damages are available under § 504." *Moreno v. Consolidated Rail Corp.*, 99 F. 3d 782, 789 (6th Cir. 1996).

These conclusions by the other courts of appeals are, in fact, compelled by this Court's rulings. The remedies for violations of Section 202 of the ADA and Section 504 of the Rehabilitation Act "are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964" (*Barnes v. Gorman*, 536 U.S. 181, 185 (2002)). See 42 U.S.C. 12133; 29 U.S.C. 794a(a)(2). This Court has repeatedly stated that Title VI allows private individuals to seek compensatory damages for intentional acts of discrimination—the kind of discrimination that Discovery House proved here. See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70 (1992); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 & n.9 (1984); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983). In *Barnes v. Gorman*, *supra*, the Court, in the course of holding that punitive damages are not available in an action brought under Section 202 and Section 504, treated the availability of compensatory damages under those provisions as a settled proposition. See 536 U.S. at 185-89.

The court of appeals made no effort to reconcile its holding with the decisions of the other courts of appeals or with this

Court's decisions.[3] Instead, the court of appeals simply asserted that "[f]or the most part, the cases * * * concern equitable relief" (Pet. App. 4a) and that in "cases discussing remedies" under Title VI, "equitable relief is the order of the day." Pet. App. 6a.[4] The court of appeals also cited nothing for the proposition—inconsistent with centuries of Anglo-American legal tradition—that equitable relief is the norm and compensatory damages the exception. As this Court said in a case involving another statute that incorporates Title VI remedies, that proposition "conflicts with sound logic. * * * [I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate." *Franklin*, 503 U.S. at 75-76 (addressing Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*).

2. The court of appeals' decision cannot be defended on the ground that recovery for lost profits somehow stands on a

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[3] Respondents did not advance, in either the trial court or the court of appeals, the ground for decision that the court of appeals relied on—that Section 202 and Section 504 afford no right to compensatory damages in the form of lost profits. After the court of appeals decided the case on that ground, all of the contrary decisions of the other courts of appeals and of this Court were cited to the court below in Discovery House's petition for rehearing. See Pet. for Reh. 1, 4-6.

[4] The court of appeals also confidently asserted that "[t]he one thing that is clear" under Title VI "is that lost profits are not expressly provided for" (Pet. App. 6a). Of course there is no *express* provision for any private remedy, legal or equitable, under Title VI: As this Court has frequently explained, the private remedies under Title VI, including the well-established right to compensatory damages, are implied remedies. See *Barnes*, 536 U.S. at 185, quoting *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001): The Court's "decisions have found an implied right of action * * * and Congress has acknowledged this right in amendments to the statute, leaving it 'beyond dispute that private individuals may sue to enforce' Title VI." (emphasis and citations omitted).

different footing from other forms of compensatory damages. In fact, this Court's decisions establish the opposite: that recovery for lost profits is a particularly appropriate compensatory remedy under Title VI and, therefore, under Section 202 and Section 504.

As the Court explained in *Barnes v. Gorman, supra*, a decision specifically dealing with the damages remedies available for a violation of Section 202, Title VI—the template for Section 202 remedies—is "'much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Barnes*, 536 U.S. at 186, quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis omitted; brackets in original). Therefore a "contract-law analogy * * * applies * * * in determining the scope of damages remedies" under provisions that, like Section 202 and Section 504, incorporate Title VI by reference. *Barnes*, 536 U.S. at 187 (emphasis omitted), citing *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 287 (1998). Specifically, this Court ruled, the available remedies under Section 202 are "those remedies traditionally available in suits for breach of contract" (536 U.S. at 187).

Damages for lost profits are the quintessential example of a "remed[y] traditionally available in suits for breach of contract." It is hornbook law that the standard remedy for a breach of contract is the expectation measure, which "attempt[s] to put [the injured] party in as good a position as it would have been in had * * * there been no breach." III E. Allen Farnsworth, Farnsworth on Contracts § 12.1 at 147 (2d ed. 1998); see Restatement (Second) of Contracts § 344, comment *a*. When the breach prevents the promisee from earning a profit, the net lost profit (subject to limitations based on foreseeability, which is not in issue here) is precisely what the standard remedy for breach of contract seeks to provide. See, *e.g.*, Restatement (Second) of Contracts

§ 347; *id.*, comment *a*; *id.*, comment *b* & illustrations 1, 2. In *Barnes*, this Court ruled that punitive damages are not available in an action under Section 202 because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract" (536 U.S. at 187). It follows that lost profits—which, as the expectation measure, are not only "generally * * * available" but affirmatively preferred—are a singularly appropriate measure of damages under Section 202. The Court stated in *Barnes* that when a party violates Section 202, the wrong "is 'made good' when the [wrongdoer] compensates [the victim] * * * for the loss caused by" the wrong. 536 U.S. at 189 (emphasis omitted). The "loss caused by" respondents' wrongful actions in this case was precisely what the jury's award measured.

3. The issue on which the court of appeals erred is one of great importance. When a disabled individual, or another party whose rights are protected by Section 202 and Section 504, achieves compliance only after lengthy battle, as Discovery House did here, equitable relief "accords * * * no remedy at all" (*Franklin*, 503 U.S. at 76). A compensatory remedy is the only meaningful remedy. By the same token, as we have said, under the approach taken by the court of appeals, an entity that is resisting compliance with the ADA or the Rehabilitation Act has every incentive to delay as long as possible; it faces no risk that it will have to repay the losses it is imposing on the party that is asserting rights under those statutes.

In these respects the recovery of lost profits is again no different from any other compensatory remedy: unless this measure of damages is made available, violations of the ADA and the Rehabilitation Act will go unremedied, and potential defendants will have every incentive to resist and delay. Respondents argued, in both the district court and the court of appeals, that Section 202 and Section 504 protect only disabled individuals and not a firm like Discovery House that

serves the disabled. But that argument—which, as the court of appeals noted in this case, has been squarely rejected by every court of appeals that has considered it—was also rejected by the district court in this case, and the court of appeals below chose not to address it. There is, in these circumstances, no reason whatever to allow the regime that the court of appeals' approach implements—one in which firms like Discovery House can theoretically assert rights under Section 202 and Section 504, but government entities and recipients of federal funds have little incentive to comply until they are ordered to do so, and no remedy will be afforded for even very costly delay.

Even in the specific context presented by this case, the court of appeals' ruling is potentially very harmful. Chemical dependency is a serious national health problem in the United States, and heroin addiction is a particularly virulent affliction. Neighborhood treatment centers, which have the potential to make therapy and counseling available to dependent individuals in a way that other facilities do not, are a promising means of addressing this problem. But as the court of appeals itself recognized, neighborhood drug rehabilitation facilities often encounter local opposition, opposition that is sometimes based on irrational and impermissible stereotyping. See Pet. App. 1a.

Indeed, disputes that are essentially identical to this one—in which local governments tried to prevent the operation of drug treatment clinics or halfway houses, in alleged violation of the ADA and the Rehabilitation Act—have already reached the courts of appeals on many other occasions. See, *e.g.*, *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F. 3d 35 (2d Cir. 2002); *MX Group, Inc. v. City of Covington*, 293 F. 3d 326 (6th Cir. 2002); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37 (2d Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3d 725 (9th Cir.

1999). Disputes like these, between municipalities and local treatment centers, should be resolved on the merits, not on the basis of a battle of attrition in which local governments have an opportunity and an incentive to outwait firms that want to provide services to the disabled, until those firms' resources are exhausted. The approach taken by the court of appeals—which apparently would permit equitable relief but would deny recovery for lost profits—would produce that perverse and harmful effect.

II. The Court Of Appeals Improperly Failed To Treat The Jury's Finding Of Irrational Discrimination As A Finding Of Fact Subject Only To Limited Appellate Review.

In addition to its claims under Section 202 and Section 504, Discovery House stated a claim under 42 U.S.C. 1983, seeking damages on the ground that it was subject to intentional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The court of appeals overturned the jury's verdict in favor of Discovery House on this claim and ordered the district court to enter judgment in favor of respondents. That ruling by the court of appeals reflects a fundamental failure to understand the nature of the inquiry into intentional discrimination under the Equal Protection Clause. Under this Court's decisions that question is one of fact, to be determined by the finder of fact, subject only to limited appellate review. The court of appeals treated this question as one that it was free to determine on appellate review.

The court of appeals did not fully acknowledge that it was taking this approach, but its actions leave no doubt that it did. The court never questioned—or even quoted—the instruction that the jury was given on the equal protection issue. That instruction was, in any event, precisely in accord with this Court's decisions. The court of appeals did not refer to the standard set forth in Rule 50(a)(1) of the Federal Rules of

Civil Procedure: that a judgment as a matter of law may be granted only if "there is no legally sufficient basis for a reasonable jury to find for that party on that issue * * * ."

Nor did the court of appeals state, at any point, that no reasonable jury could have found the facts in favor of Discovery House. The court's failure to do this is in a sense not surprising, because the evidence was plainly sufficient to create an issue for the jury. And the court never mentioned this Court's opinions explicitly cautioning appellate courts against ordering judgment as a matter of law (as opposed to a new trial) against a party who has won a jury verdict that the trial judge allowed to stand. See *Weisgram v. Marley Co.*, 528 U.S. 440, 451 (2000), quoting *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 325 (1967). Instead, the court of appeals simply, and impermissibly, reevaluated the evidence and reached its own conclusion on the Equal Protection issue.

1. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), establishes that a government action violates the Equal Protection Clause if it is the product of "an irrational prejudice against the [disabled]" (*id.* at 450). The Court in *City of Cleburne* further explained that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating [a facility for the disabled] differently from" other uses. *Id.* at 448.

The instructions to the jury on Discovery House's equal protection claim closely followed *City of Cleburne*: They required Discovery House to prove that "[t]he reason for" respondents' denial of zoning permission to Discovery House "was irrational discrimination based on a fear or dislike of plaintiff's providing methadone treatment to drug-addicted patients." R. 4:60. The court of appeals never suggested—nor could it have, plausibly—that the trial court's instruction was erroneous.

2. No detailed examination of the record is needed to show that the evidence presented at trial was plainly sufficient to create a jury issue on the question whether respondents acted out of the impermissible reasons described in the instructions. The members of respondent BZA testified that their decision was not influenced by popular hostility to heroin addicts but was based solely on the ground that Discovery House's proposed facility was not an office "for physicians, dentists, and other professions dealing with public health" within the meaning of the zoning ordinance. Pet. App. 29a. As the district court carefully explained in denying respondents' motion for summary judgment, the jury had ample ground to disbelieve this testimony and, therefore, to infer an impermissible intent. See Pet. App. 29a-34a.

Both the professional staff of the Department of Metropolitan Development and the Indiana Court of Appeals believed that the BZA's interpretation of the ordinance was wrong; the Court of Appeals concluded that Discovery House's proposed use "fits squarely under the [zoning] ordinance's language" and was permitted by "the plain and unambiguous language of" the zoning ordinance. *Discovery House, Inc. v. Metropolitan Bd. of Zoning Appeals*, 701 N.E. 2d 577, 579 (Ind. Ct. App. 1998). As that court also stated, the bulk of the testimony against Discovery House at the hearing concerned not the requirements of the zoning ordinance but the alleged "threat to the community, to the schools, children, neighbors, and businesses in the area." *Id.* at 582. See also Pet. App. 30a-32a (summarizing testimony). Several members of the Board had difficulty explaining the supposed basis for their decision, and some acknowledged that popular opposition to the facility had affected their judgment. See Pet. App. 33a-34a .

This combination of evidence, while perhaps not enough to compel a judgment in favor of Discovery House, was obviously enough to allow a reasonable jury to disbelieve the

Board's stated rationale. Under this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000), it follows that the jury was entitled to conclude that respondents gave in to irrational popular prejudice.[5] Indeed, the court of appeals essentially admitted as much: it acknowledged that the conclusion that respondents "were, in fact, discriminating against [Discovery House's] proposed clientele" was "a possible conclusion, in a speculative sense." Pet. App. 11a. But the court rejected this "possible" conclusion—the conclusion that the jury had reached—on the ground that "the evidence falls short of proving the point." Pet. App. 11a. The court then reached its own conclusion, based on its reading of the evidence, about the likelihood that respondents acted out of prejudice. At no point did the court below show any inclination to conform to this Court's strictures concerning appellate review of juries' factual determinations—to "draw all reasonable inferences in favor of" Discovery House, to avoid "mak[ing] credibility determinations or weigh[ing] the evidence[,]" and to "disregard all evidence favorable to [respondents] that the jury [was] not required to believe." *Reeves*, 530 U.S at 150-51.[6]

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[5] For purposes of the Equal Protection Clause there is no difference, of course, between the Board's acquiescing in popular hostility that was motivated by irrational prejudice, and the Board itself acting out of irrational prejudice. See *City of Cleburne*, 473 U.S. 448 (citation omitted): "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, * * * and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."

[6] The court emphasized that, in its view, the jury applied an improper standard to the Equal Protection Clause claim because it confused that claim with Discovery House's ADA claim. Pet. App. 11a-12a. To the extent this speculation was the basis for the court's decision to order judgment as a matter of law, the court's action is particularly egregious. Alleged jury confusion of that sort—even assuming that an appellate court should second-guess the trial judge about its likely existence—is

The conclusion is inescapable that the court of appeals believed that it was its province—not the jury's—to determine whether respondents acted with discriminatory intent. This is error. This Court has squarely held that the question whether a government decisionmaker has acted with impermissible racially discriminatory intent, in violation of the Equal Protection Clause, is a question of fact, to be determined by the finder of fact, subject only to limited appellate review. See *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); see also *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). Discrimination against the disabled is not subject to the "strict scrutiny" that is appropriate for racial discrimination, as the court below emphasized. See Pet. App. 9a-10a. But the question raised by Discovery House's Equal Protection Clause claim—whether respondents' actions were the product of "an irrational prejudice against the [disabled]" (*City of Cleburne*, 473 U.S. at 450)—is no less a question of fact than is the question whether a government actor has acted out of racial prejudice. The court below utterly failed to recognize this important point, and its decision warrants further review.

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classically grounds for a new trial, at most, not judgment in favor of the party who lost before the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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